Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-817

DONALD L. BRISENDINE and JOHN BASS,
Petitioners,

v.

NATIONAL MOVIE-DINE, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

No opinion was rendered by either the Fifth Circuit or by the District Court for the Northern District of Texas, Dallas Division. No opinion was rendered by the District Court for the Southern District of New York, which made an order compelling arbitration in a collateral proceeding between the corporate respondent and petitioners. The orders of these courts are found in the petitioners' appendix.

Jurisdiction

The order of the Fifth Circuit, dismissing petitioners' appeal from an order of the Texas district court staying proceedings in favor of arbitration, was entered on September 1, 1977. Jurisdiction may be invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether the Court of Appeals correctly dismissed petitioners' appeal from a district court order staying proceedings in favor of arbitration where a prior order of another district court had ordered arbitration of the subject matter and the order appealed from was not an interlocutory order granting an injunction within the meaning of 28 U.S.C. § 1292(a)(1).

Statutory Provision Involved

UNITED STATES CODE, Title 28:

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; . . .

Statement of the Case

On October 4, 1976, petitioners Brisendine and Bass filed a diversity action in the District Court for the Northern District of Texas, Dallas Division, seeking rescission

of Distributor Licensing Agreements between each of them and respondent National Movie-Dine, Inc. The prayer also asked for incidental damages and statutory treble damages under Texas law.

In response, on October 22, 1976, National Movie-Dine, Inc. filed a petition in the District Court for the Southern District of New York asking for an order pursuant to 9 U.S.C. § 4 compelling the Texas plaintiffs (petitioners herein) to proceed to arbitration in conformity with the arbitration provision of the Distributor Licensing Agreements. In these Agreements the parties had broadly provided for arbitration in New York City, invoked the jurisdiction of the New York courts and specifically submitted themselves to their jurisdiction.

Petitioners were personally served in Texas. They failed to appear or answer, and, on December 2, 1976, the District Court for the Southern District of New York, noting their default, made and entered an order directing them to arbitrate their disputes with National Movie-Dine, Inc. in New York City. (A.1) Petitioners were served with notice of entry of this order by mail, on December 10, 1976. They never appealed from the December 2, 1976 order.

Meanwhile, on November 24, 1976, National Movie-Dine, Inc., Creative Cine-Tel, Inc., Ernest Bogen and Lawrence H. Forray, the only Texas defendants (respondents herein) who had been served with process, moved in the Texas action, inter alia, to stay those proceedings pending arbitration pursuant to 9 U.S.C. § 3 and for a consequent enlargement of their time to plead to the complaint pursuant to Rule 6(b) of the Federal Rules of Civil Procedure.

On April 21, 1977, the Texas district court, referring, amongst other things, to the December 2, 1976 order of the District Court for the Southern District of New York directing petitioners to proceed to arbitration, entered a revised

order staying the Texas action pending arbitration. (A.6) Petitioners thereafter appealed to the Fifth Circuit Court of Appeals.

They filed an appellate brief arguing the same position they take in their present petition to this Court. (In the district court, petitioners had not made any written submission in opposition to the respondents' stay application.) Respondents did not file an answer to this brief, but moved, instead, to dismiss the appeal on the grounds that the Court of Appeals did not have jurisdiction of the appeal under 28 U.S.C. § 1292(a)(1), and, that, in any event, the order of the District Court for the Southern District of New York was res judicata of the issues sought to be tendered on the appeal.

In their memorandum to the Court of Appeals, respondents argued that, as the petitioners' complaint in the District Court for the Northern District of Texas was equitable in nature, under the so-called *Enelow-Ettelson* rule [*Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379 (1935); *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942)], as viewed in the light of *City of Morgantown, W. Va.* v. *Royal Insurance Co.*, 337 U.S. 254 (1949), and *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176 (1955), the Texas order was not appealable as an order granting an injunction under 28 U.S.C. § 1292(a)(1). *See* 9 Moore's *Federal Practice*, ¶¶ 110.20[3], [4.-1] at 240-49.

The settled status of the *Enelow-Ettelson* rule and the Fifth Circuit's adherence to it was drawn to that Court's attention by respondents' citation of its decision in *Cobb* v. *Lewis*, 488 F.2d 41, 46 (1974), and its applicability to an equity suit seeking incidental legal relief as well, by citation of its decision in *Thompson* v. *House of Nine, Inc.*, 482 F.2d 888 (1973).

The res judicata effect of the unappealed order of the United States District Court for the Southern District of

New York, which had been noted in the orders of the Texas district court (A.4,7) was emphasized to the Court of Appeals by citation of *Angel* v. *Bullington*, 330 U.S. 183 (1947).

Petitioners did not file any opposition to the respondents' motion to dismiss their appeal. By order entered September 1, 1977 (A.9), and thereupon issued as its mandate, the Fifth Circuit Court of Appeals granted the motion to dismiss without comment.

Argument

Review is plainly unwarranted in this case.

In the first instance, it is precluded by the long established principle that this Court will not review on certiorari "a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). Having to proceed with arbitration is not such a circumstance. *See* 9 Moore's *Federal Practice* ¶ 110.20[4.-1](3), at 249.

Moreover, petitioners, by the direction of their arguments, are actually asking this Court to review the stay order of the Texas district court rather than that of the Fifth Circuit refusing to hear their appeal from the stay order. The issues resolved by the two orders are entirely separate, and, in the case of the district court order, they were not presented to or considered by the Fifth Circuit on the motion to dismiss. This Court will rarely, if ever, review matters not presented to the court below, *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967), or fully considered by it, because they are "not ripe for review." *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967).

Intrinsically, there is nothing about the Fifth Circuit's order which merits review. It does not present an opportunity for reconsideration of the *Enelow-Ettelson* line of cases, which permit appeals to the courts of appeals from stay orders in law type actions. *See* 9 Moore's *Federal Practice* ¶ 110.20[3], at 245. It does, however, follow the holding of *Baltimore Contractors* v. *Bodinger,* 348 U.S. 176 (1955), which teaches that such orders have never been appealable in our system and have not been made so by any enacted modifications to the final judgment rule. Accordingly, as the Court has emphasized in *Baltimore Contractors,* it is for the Congress to determine if any change in favor of allowing interlocutory appeals in cases such as this is desirable. Within the area left to judicial determination, the weight of authority is against expansion of jurisdiction over interlocutory appeals. *Id.* at 185. This is especially so where, as here, the order petitioners sought to appeal is one permitting arbitration to go forward. *Cf. Stateside Machinery Co., Ltd.* v. *Alperin,* 526 F.2d 480 (3rd Cir. 1975); *New England Power Co.* v. *Asiatic Petroleum Corp.,* 456 F.2d 183 (1st Cir. 1972). *See* 9 Moore's *Federal Practice* ¶ 110.20[4.-1](3), at 249.

Conclusion

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

STEPHEN SAYRE SINGER
Counsel for Respondents

Dated: December 19, 1977